(1953) 01 AHC CK 0005

In the Allahabad High Court

Case No : Application No. 6 of 1950

Shrimati Ram Piari and 2 others — APPELLANT

Vs

Ram Adhin and 3 others — RESPONDENT

Date of Decision : 16-01-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Transfer of Property Act, 1882 — Section 60, 62, 76, 83

Citation : (1953) 23 AWR 407

Hon'ble Judges : Sapru, J;Mukerji, J

Bench : Division Bench

Advocate : B.K. Dhaon, for the Appellant; Hyder Husain for the Opp. Party No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Sapru, J.—This application in revision has been referred to this Bench by a learned Single Judge of this Court because, as we shall show hereinafter, this case raises a question on which there is a conflict of opinion in this Court.

2. This revision arises in the following circumstances. The Plaintiffs presented an application u/s 12 of the Agriculturists'' Relief Act for redemption of certain zamindari property mortgaged by their predecessor-in-interest. They impleaded in this application one, Ram Adhin, who is now dead and is represented in this revision by his heirs and legal representatives, as a person who they alleged had been put up fictitiously by the mortgagee and who pleaded that he was a tenant of the land in his own right and not a person put up fictitiously by the mortgagee. The trial court framed four issues and decreed the suit holding that a sum of Rs. 1,660/ - was due from the mortgagors to the mortgagee and that, on payment of that sum, the mortgagors would be entitled to redeem the property. It further found that the patta in favour of Ram Adhin was not a genuine one. According to the learned Munsif, it was a farzi document. He further found that Ram Adhin had not acquired any adverse possession and was, indeed, not in

adverse possession of the property at all. From that decree of the trial court, the Defendant No. 4 went in appeal to the learned District Judge. The learned District Judge allowed the appeal, holding that the decree against Defendant No. 4 should be set aside. In doing so, he stated that he was following the case of jagannath Sahu v. Srikant Dube 1949 A.W.R. (H.C.) 205. He found that there was a difference of opinion between the former and the later view of this Court and, quite rightly, he followed the later decision of this Court. Having regard to the view that he was taking, he left it was neither necessary for him to go into the question whether the tenancy of the Appellant before him was genuine or fictitious, nor to consider whether a reference to the revenue court was permissible or not on the ground that a question of tenancy right was involved. From that decree of the learned District Judge the Plaintiffs have come up in revision to this Court.

3. When the case came up before a learned Single Judge of this Court, he found that the view of the learned District judge that the decisions of this Court were not unanimous on the point which had been raised before the learned District Judge was correct. As the question, in the opinion of the learned Single Judge, was of some importance, he decided to refer it to a Division Bench.

4. The question for our consideration is whether, in a suit for redemption u/s 12 of the Agriculturists'' Relief Act, it is open to the civil court to determine the question whether the mortgagee has put up a fictitious person as a tenant to prevent the mortgagor from obtaining possession over the mortgaged property. We shall now proceed to consider this question. The application has been argued with commendable thoroughness by learned Counsel for both the parties and the relevant law has been placed before us for our consideration. The first case to which our attention has been invited is that of Ram Kirpal Misir v. Bhagwati Saran Misir 1949 A.W.R. (H.C.) 214. In this case it was observed by Bhargava, J., that in a suit for redemption u/s 12 of the Agriculturists'' Relief Act, the civil court could determine the question whether the mortgagee had put up a fictitious person as a tenant to prevent the mortgagor from obtaining possession over the mortgaged property. The learned Judge pointed out that proceedings u/s 12 of the Agriculturists'' Relief Act were in the nature of a suit it having been so held in the case of Jawahir v. Jadu 1947 A.L.J. 665. The paramount consideration with Bhargava, J., appears to have been, though it is not stated by him explicitly, that it was desirable to avoid multiplicity of proceedings. He was of the opinion that the cause of action against the mortgagee was not different from the cause of action against the person who had been put fictitiously into possession of the mortgaged property. For these reasons, he thought that the question could be gone into by the court in an application u/s 12 of the Agriculturists'' Relief Act.

5. This decision was dissented from in a later case decided by Seth, J., who indeed had committed himself to a different view from that of Bhargva, J., in an earlier but unreported case. In another case namely, Jagannath Sahu v. Srikant Dube 1949 A.W.R. (H.C.) 205, a judgment marked by his usual lucidity, Seth, J.,

in that held that the jurisdiction of a court in deciding an application u/s 12 of the Agriculturists'' Relief Act, whether as a court of original jurisdiction or as a court of appeal, was a special jurisdiction conferred upon it by a special provision of the statute and was limited within the four corners of that section. His view was that the only jurisdiction that the court possessed in an application u/s 12 of the Agriculturists'' Relief Act was to adjudicate upon the question of redemption and no more. According to the view of that learned Judge, it was not open to the court to determine an adverse claim to tenancy rights by a third person whom the mortgagor alleged to have been put onward fictitiously by the mortgagee. In this case, there is a reference to an earlier but unreported decision of this Court, namely, Bhagwati Misir v. Ram Ugrah Misir (Civil Revision No. 544 of 1945, decided on October 1, 1948). The learned Judge admitted that it was a part of the duty of the court in ordering redemption to put the mortgagor in possession of the mortgaged property. But he referred to a Full Bench decision of this Court in Ram Shankar Lal v. Ganesh Prasad L.R. 29 All. 385, in which it was held that the words "mortgaged property" meant the interest in specific immovable property which the mortgagor professed to transfer, whatever that interest might be. After considering that case and the definition of the "mortgaged property" in the Transfer of Property Act, he came to the conclusion that the delivery of possession of proprietary rights in zamindari property, did not require the dispossession of the tenants in actual cultivatory occupation. Seth, J. also referred to the judgment of Bhargava, J. and did not agree with the view of the latter that the question of adverse claim to tenancy rights by a third person whom the mortgagor alleged to have been fictitiously put up by the mortgagee could be entertained by the court in proceedings u/s 12 of the Agriculturists'' Relief Act. This decision of Seth, J. was followed in the case of Ram Datt Singh v. Ajodhia Singh 1951 A.W.R. (H.C.) 16, by Ghulam Hasan, J. That learned Judge placed reliance upon the reasoning indicated by Seth, J. in his judgment referred to above.

6. The question, in our opinion is also capable of being looked at from a somewhat different angle. We are not prepared to commit ourselves to the view that any substantive change has been introduced in the law relating to redemption by Section 12 of the Agriculturists'' Relief Act. That Act no doubt provides a speedy and efficacious remedy for redemption of usufructuary mortgages in a certain class of cases. But, as we read Section 12, we find that no change in the substantive law relating to redemption has been introduced by it. The question, therefore, is whether u/s 60 of the Transfer of Property Act Defendant No. 4 was a necessary party to the suit, whose rights must be adjudicated upon by the court. Section 60 of the Transfer of Property Act provides:

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgage property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

7. Section 83 directs that:

Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amounts so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgement in writing that any right in derogation of the mortgagor''s interest transferred to the mortgagee has been extinguished.

8. The question, therefore, in our opinion, really turns upon what is meant by this right to obtain possession. We have been invited to a number of authorities on the point by learned Counsel for both the parties. But it is unnecessary to go into them as in the cases cited, this point does not seem to have been specifically raised and decided. The nearest case to our mind on this point is that of Ram Chand v. Raj Hans A.L.J. 517, where a learned Judge of this Court observed:

It is, of course, conceivable that during the term of the mortgage a right of occupancy might have been acquired by lapse of time, in which case the tenants would have been entitled to retain possession of the land;....

9. In the particular case before him that was not, however the case.

10. Another case to which attention may be invited is that Hemendra Nath and Others Vs. Tulshi Singh and Others . In this case the learned Single Judge held:

The redemption of the mortgage by the Plaintiffs does not put an end to the tenancy created in favour of Defendants 3 and 4. It is not necessary for me to consider as to whether the position of Defendants 3 and 4 is that of a statutory tenant u/s 19 of Act III of 1926 (local).

11. Reference may be made in this connection to the provisions of Section 76 of the Transfer of Property Act. They enable the mortgagee in possession, or as he is generally called the usufructuary mortgagee, to manage the mortgaged

property as a person of ordinary prudence would manage his own property. In the course of this prudent management, it is open to a mortgagee to create leases or give the land for cultivation to tenants. The mortgage deed in this case expressly gives the widest possible powers to the mortgagee in this respect. According to the mortgagee deed, it was open to the mortgagee to let out the land for management or do whatever he liked with it. In these circumstances, handing over possession, in our opinion, can only mean such possession as the property is capable of at the time when the redemption takes place.

12. We may also refer to the observations of a Single Judge of the Calcutta High Court in Rajendra Nath Chandra and Another Vs. Dinu Prodhan and Others, . The learned Judge deciding that case observes that though the mortgagor is entitled to possession under the law, there is nothing contained in any of the provisions of Sections 60 and 62 which in any way militates against the position that he was only entitled to such possession, as the land was capable of in accordance with the terms of the mortgage. This being so, we do not think that in a redemption suit it is actually necessary for the Court to put the mortgagor into actual physical possession of the mortgaged property in dispute. The nature of the possession can well depend in each case upon the rights conferred by the instrument relating to the mortgage. For this reason we think it was not necessary to enquire into the question whether the transaction in this case was genuine one or not. That, of course, is a matter which can be fought out in a regular suit between the parties. What the court was concerned with was to enable the mortgagor to have his property redeemed on payment of the amount found due to the mortgagee.

13. Learned Counsel for the applicants contends that in this particular case a specific issue was raised as regards the farzi character or otherwise of the patta in favour of Defendant No. 4 opposite party No. 1. The learned Judge did not record a finding on the issue raised as he felt-and in our opinion rightly-that he was bound by a later decision of this Court which had laid down that in a suit for redemption u/s 12 of the Agriculturists'' Relief Act the court could not go into such a question. In these circumstances, the learned Judge cannot be said to have set aside the finding of the learned Munsif that the transaction was a farzi one and that the Defendant did not complete his title to it by adverse possession and that, indeed, he could not do so, having derived his title from the mortgagee. Having regard to this finding, we think it is possible for the applicants, on the assumption that they wish to pursue the matter further, to institute a regular suit and fight the matter out in a regular court. In this view of the case, we are not disposed in the particular case to exercise the discretionary powers which we possess u/s 115 of the CPC in favour of the applicants.

14. For the reasons given above, this application in revision is dismissed. But in all the circumstances of the case we think it undesirable to make any order as to costs.

15. The stay order is discharged.

